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No. 01-7662

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT

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56

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
I. JURY SELECTION	2
A. The State's race-neutral, case-related reasons for striking prospective jurors	2
B. Wide divergence of views on capital punishment of African-American and non-minority venire members	9
C. The State's consistent treatment of similarly situated venire members	10
D. Disparate questioning of venire members based on venire members' views, not race	16
E. Jury shuffles	21
II. THE *SWAIN* HEARING IN STATE COURT	23
A. Evidence admitted at the hearing	23
B. Evidence not before the trial judge	28
III. THE *BATSON* CLAIM IN STATE COURT	29
IV. FEDERAL HABEAS PROCEEDINGS	30
SUMMARY OF THE ARGUMENT	31
ARGUMENT	32
I. MILLER-EL HAS FAILED TO SHOW THAT THE STATE COURTS' REJECTION OF HIS *BATSON* CLAIM IS UNREASONABLE	32
A. A trial judge's finding at *Batson's* third step is entitled to great deference	32

TABLE OF CONTENTS—Continued

Page

B. The trial judge's finding of no purposeful discrimination is amply supported by the voir dire record 34

C. The trial judge considered all relevant evidence properly before him and determined reasonably that Miller-El failed to prove purposeful discrimination 38

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT MILLER-EL WAS NOT ENTITLED TO A CERTIFICATE OF APPEALABILITY BASED ON HIS *BATSON* CLAIM 42

A. The court of appeals correctly applied the certificate of appealability standard 42

1. The court below recited and applied *Slack* 42

2. The lower court's COA analysis was consistent with the precedent of this Court and the vast majority of federal circuit courts 44

B. The court of appeals correctly interpreted and applied 28 U.S.C. § 2254 to Miller-El's *Batson* claim 47

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Page

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 35

Barefoot v. Estelle, 463 U.S. 880 (1983) 43

Barrientes v. Johnson, 221 F.3d 741 (5th Cir. 2000) 46

Batson v. Kentucky, 476 U.S. 79 (1986) ..... *passim*

Bush v. Vera, 517 U.S. 952 (1996) 35

Caldwell v. Maloney, 159 F.3d 639 (1st Cir. 1998) 36

Chambers v. State, 784 S.W.2d 29 (Tex. Crim. App. 1989) 28, 39, 40

Coady v. Vaughn, 251 F.3d 480 (3rd Cir. 2001) 46

Coleman v. Ryan, 196 F.3d 793 (7th Cir. 1999) 46

Cooey v. Coyle, 289 F.3d 882 (6th Cir. 2002) 46

Dowthitt v. Johnson, 230 F.3d 733 (5th Cir. 2000) 46

Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996) 44

Easley v. Cromartie, 532 U.S. 234 (2001) 35

Ex parte Haliburton, 755 S.W.2d 131 (Tex. Crim. App. 1988) 39

Foster v. Johnson, 293 F.3d 766, 2002 WL 1233208 (5th Cir. June 6, 2002) 44

Fuller v. Johnson, 114 F.3d 491 (5th Cir. 1997) 44

Gattis v. Snyder, 278 F.3d 222 (3rd Cir. 2002) 49

Hernandez v. New York, 500 U.S. 352 (1991) 32, 33, 35, 38

Hill v. Johnson, 210 F.3d 481 (5th Cir. 2000) 46

Johnson v. Hargett, 229 F.3d 1163, 2000 WL 1093227 (10th Cir. 2000) 46

Johnston v. Luebbers, 288 F.3d 1048 (8th Cir. 2002) 49

TABLE OF AUTHORITIES—Continued

	Page
Latham v. State, 656 S.W.2d 478 (Tex. Crim. App. 1983)	22
Mata v. Johnson, 99 F.3d 1261 (5th Cir. 1996)	44
Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997)	37
McCleskey v. Kemp, 481 U.S. 279 (1987)	35
McWee v. Weldon, 283 F.3d 179 (4th Cir. 2002)	46
(Dorothy) Miller-El v. State, 790 S.W.2d 351 (Tex.App.—Dallas 1990)	28, 39, 40
Miller-El v. State, 748 S.W.2d 459 (Tex. Crim. App. 1988)	29
Nevius v. McDaniel, 218 F.3d 940 (9th Cir. 2000)	46
Patton v. Yount, 467 U.S. 1025 (1984)	34
Purkett v. Elem, 514 U.S. 765 (1995)	32, 41
Ramer v. Maxwell, 2001 WL 55519 (10th Cir. 2001)	46
Reeves v. Sanderson Plumbing Product, Inc., 530 U.S. 133 (2000)	38-39
Robison v. Johnson, 151 F.3d 256 (5th Cir. 1998)	44
Sallahdin v. Gibson, 275 F.3d 1211 (10th Cir. 2002)	49
Sanna v. Paolo, 265 F.3d 1 (1st Cir. 2001)	49
Shayesteh v. City of South Salt Lake, 217 F.3d 1281 (10th Cir. 2000)	46
Slack v. McDaniel, 529 U.S. 473 (2000)	43, 45
Stark v. State, 657 S.W.2d 115 (Tex. Crim. App. 1983)	22
Swain v. Alabama, 380 U.S. 2002 (1965)	23
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	32, 41
Torres v. Prunty, 223 F.3d 1103 (9th Cir. 2000)	49

TABLE OF AUTHORITIES—Continued

	Page
United States v. Alston, 895F.2d 1362 (11th Cir. 1990)	36
United States v. Lance, 853 F.2d 1177 (5th Cir. 1988)	37
Valdez v. Cockrell, 274 F.3d 941 (5th Cir. 2001)	48
Wainwright v. Witt, 469 U.S. 412 (1985)	2, 33
Weaver v. Bowersox, 241 F.3d 1024 (8th Cir. 2001)	49
Williams v. Taylor, 529 U.S. 362 (2000)	45
Wheat v. Johnson, 238 F.3d 357 (5th Cir. 2001)	46
Young v. Catoe, 205 F.3d 750 (4th Cir. 2000)	49

CONSTITUTIONS AND STATUTES

28 U.S.C. § 2253	*passim*
28 U.S.C. § 2254	*passim*
Tex. Code Crim. Proc. Ann. art. 35.11	22

Thomas Joe Miller-El was tried and convicted of capital murder by a jury consisting of two white males, seven white females, an African-American male, a Filipino-American male, and a Latino male. In selecting that jury, the prosecution consistently employed all permissible means to identify and remove venire members with unfavorable views on the death penalty, regardless of their race. The vast majority of non-minority panelists favored the death penalty and were willing to impose it, while the vast majority of African-American panelists were either opposed to the death penalty or were unwilling to impose it. Thus, to the extent that a greater percentage of African-Americans were struck, those percentages mirror the divergent views on the death penalty of minority and non-minority venire members. Based on this Court's established equal protection jurisprudence, a peremptory challenge constitutes a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), only if the prosecutor struck a juror because of the juror's race. A *Batson* violation cannot be founded on the sins of the father, nor can it be based merely on a showing of a disparate impact. Miller-El simply cannot overcome the credibility determination of the trial judge that the State did not exercise peremptory challenges based on race at his trial. Peremptory strikes are used to eliminate venire members whose views are not so extreme as to render them challengeable for cause. Thus, the decision whether to strike them must be based on an evaluation of the totality of their responses, as well as their demeanor and other intangibles. Acceptance of Miller-El's submission would prevent the parties from exercising their professional judgment in this regard and instead would require the acceptance of any minority venire member who was not so biased as to be subject to a challenge for cause.

STATEMENT OF THE CASE

In the pre-dawn hours of November 16, 1985, Thomas Joe Miller-El and co-defendant Kennard Flowers robbed a Dallas

motel at gunpoint. Motel employees Donald Hall and Doug Walker complied with all Miller-El's demands, handing over the cash drawer, opening the combination lock to the bellman's closet, and turning over their own valuable personal property. Miller-El and Flowers then bound and gagged the victims. After Flowers left the scene, Miller-El shot Hall and Walker twice each in the back as they lay face down in the bellman's closet. Hall survived to testify at Miller-El's trial, although Miller-El's shots had severed his spine, rendering him a paraplegic. Walker died on the bellman's closet floor.

I. JURY SELECTION

A. The State's race-neutral, case-related reasons for striking prospective jurors

Jury selection began in February 1986. The venire consisted of 108 members, 65 of whom participated in individual voir dire.[1] Nine venire members were excused based on the State's challenge for cause, the trial court finding in each case that the venire member's views concerning the death penalty would substantially impair his or her ability to serve as a juror pursuant to *Wainwright v. Witt*, 469 U.S. 412 (1985).[2] Three additional venire members were excused by agreement of the parties at the State's request in exchange for agreements to excuse venire members of the defense's choosing; two of

[1] Forty venire members were excused by agreement of the parties without voir dire, and three were excused by the trial court without voir dire.

[2] John Nelson (Voir Dire Record ("VDR") 2:663); Harold Sohner (VDR 2:716-717); Virginia Smith (VDR 2:1005); Linda Berk (VDR 3:1478); Gene Hinson (VDR 4:1696); Jeanette Butler (VDR 4:1945); Louise Carter (VDR 4:1998); Sheila White (VDR 5:2101); Joyce Willard (VDR8:3153).

these venire members had expressed opposition to the death penalty,[3] and the other had expressed ambivalence about the death penalty.[4]

The State exercised peremptory challenges to remove an additional fourteen venire members. Four of these venire members had stated they were opposed to the death penalty but had been held qualified to serve under *Wainwright v. Witt* after stating they could render a verdict according to the evidence.[5] Eight of the panelists struck by the State had expressed ambivalence about the death penalty or their ability to impose it (as well as other factors in some instances).[6] The remaining two venire members struck by the State had expressed pro-defense views regarding rehabilitation.[7]

Ten of the fourteen venire members struck by the State were African-American. As to each African-American panelist challenged, the State proffered race-neutral, case-related reasons for exercising the challenge.

Roderick Bozeman, the first African-American venire member interviewed, stated that while he believed in the death penalty as a general proposition, he thought it was only appropriate "if there's no possible way to rehabilitate a person," for instance, a "mentally disturbed" person or "a Manson type." JA 79. If he thought there was a chance the defendant could be rehabilitated, he did not think the death

[3] Clara Evans (VDR 6:2588, 2638); Jerry Mosley (VDR 7:2656, 2740).

[4] Leta Girard (VDR 6:2542, 2575).

[5] Margaret Gibson (VDR 2:485, 523); Janice Mackey (VDR 10:4022); Paul Bailey (VDR 11:4140, 4168); Anna Keaton (VDR 11:4373-74).

[6] Roderick Bozeman (Joint Appendix ("JA") 78, 81); James Holtz (VDR 2:1018-19); Joe Warren (JA 139, 140, 142, 144, 146); Edwin Rand (JA 161); Carrol Boggess (JA 192, 194, 196, 197); Wayman Kennedy (JA 216, 217, 225); Linda Baker (VDR 8:2990-91); Charlotte Whaley (VDR 10:3748).

[7] Billy Jean Fields (JA 118); Penny Crowson (VDR 3:1211).

penalty was appropriate. JA 89. Furthermore, according to Bozeman, repeated criminal acts of violence would not necessarily indicate that a person was beyond rehabilitation. JA 79. Bozeman classified himself as the type of person who believes in the death penalty in principle, but who could not actually serve on a capital jury. JA 79-80. Finally, Bozeman stated that even if the evidence compelled "yes" answers to the special issues, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. JA 90-91. The State exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence, and his belief that a prior pattern of conduct would not be sufficient to render a defendant deserving of a death sentence.[8] JA 102.

Prospective juror Billy Jean Fields stated that he believed in the death penalty and could serve on a capital jury. JA 108, 111. However, after noting that the possibility of rehabilitation would be a factor he would consider in assessing a death sentence, Fields asserted his personal religious belief that no one is beyond rehabilitation. JA 118. As Fields concluded, ". . . I feel like, if a person has the opportunity to really be talked [to] about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." JA 118. Additionally, as

[8] With the exception of venire members Joe Warren and Paul Bailey, *see* Note 64, *infra*, the State set forth its race-neutral reasons for exercising these peremptory challenges immediately after exercising the strikes. At the subsequent *Batson* hearing, the State merely asked that the trial judge take judicial notice of that prior testimony. JA 866-68.

reflected in both Fields' questionnaire and in questioning by the State, Fields' brother had been convicted numerous times in Dallas County for drug offenses. JA 124. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that the prospective juror's deeply-religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that the juror's brother had been convicted of a felony.[9] JA 131-133.

Venire member Joe Warren repeatedly answered questions posed by the prosecutor in a noncommital manner, indicating ambivalence about the death penalty and his ability to impose it. When asked whether he believed in the death penalty, Warren stated, "there are some cases where I would agree, you know, and there are others that I don't." VDR 3:1526.[10] When the prosecutor described the crimes defined as capital murder under Texas law and asked whether Warren felt the death penalty could be an appropriate punishment for such crimes, Warren responded, "Well, there again, I would say it depends on the case and the circumstances involved at the time." JA 139. When asked whether the death penalty serves a purpose, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that." JA 140. When asked whether he could make a decision between a life sentence and a death sentence, Warren equivocally replied, "I think I could." JA 142. When questioned about his ability to answer the future dangerousness special issue, Warren responded, "I suppose there's always that chance, but there again, you never know." JA 144. Finally, Warren stated, "Well, it's just like I said you know. There are cases, I mean,

[9] Contrary to Miller-El's assertion, *see* Petitioner's Brief at 24-25, the prosecutor did not cite as a reason for its strike Fields' adherence to the Catholic faith. Rather, the prosecutor cited Fields' religious-based beliefs regarding rehabilitation. *See* JA 132.

[10] This response was edited from the joint appendix. *See* JA 137.

personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice. . . ." JA 146. The State exercised a peremptory challenge to remove Warren. Subsequent to Miller-El's trial, at a hearing held in the trial court pursuant to *Batson v. Kentucky*, the prosecutor cited Warren's hesitation about imposing the death penalty and his inconsistent responses during voir dire as bases for his strike.[11] JA 857. The prosecutor also noted that Warren was struck relatively early in the jury selection process when the State still had several peremptory challenges remaining.[12] JA 855, 859. As the prosecutor observed, an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses: Early in the process, an attorney flush with challenges might feel free to strike a marginal juror; whereas, later in the process, the attorney must be more cautious in expending the precious remaining strikes. JA 856, 859, 862-63. According to the prosecutor, had Warren been examined when the State had only one strike remaining, the prosecutor would not have exercised a challenge to remove him.[13] JA 859.

While venire member Edwin Rand had indicated on his questionnaire that he believed in the death penalty, at the outset of individual voir dire he described capital punishment as a "touchy subject." JA 158. Further into the examination, the prosecutor asked Rand whether he would describe himself as (1) a person who believes in the death penalty and can

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[11] Defense counsel did not object to the State's exercise of a peremptory strike against Warren contemporaneous with the strike. JA 154. Therefore, the State did not offer race-neutral reasons at that time.

[12] Warren was twenty-eighth of 108 venire members. JA 68. The State still had nine peremptory challenges remaining after exercising a challenge to remove Warren. JA 856.

[13] On cross examination by defense counsel, the prosecutor testified that he would have struck jurors Sandra Hearn and Fernando Gutierrez before Warren had they come up earlier in the process. JA 861-62.

serve as a juror and assess the death penalty if warranted; (2) a person who believes in the death penalty but for whatever reason cannot actually participate as a juror and be involved in assessing the death penalty; (3) a person who does not believe in the death penalty but could render a verdict according to the evidence; or (4) a person who does not believe in the death penalty and cannot participate as a juror in the assessment of a death sentence. JA 160. Rand described himself as falling "[p]robably in between the first two, sitting in the jury and being able to say, 'Okay, he's guilty.' and being able to do that. But again, somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." JA 161. The State exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his ability to serve on a capital jury. JA 187.

Prospective juror Carrol Boggess also left the unmistakable impression that she was uncertain and hesitant about administering a death sentence. On her juror questionnaire, she answered affirmatively the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" Joint Lodging ("JL") 44. During individual voir dire, when asked about her views concerning the death penalty, Boggess responded, "Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." JA 192. Later she stated, "I'm not saying that I feel like I could impose the sentence myself—or I'm not going to be imposing the sentence, is that correct?" JA 194. After that, when asked whether she could vote for death, she stated, "I've never been in that situation. I don't feel like I would want to be in that situation and

whether I could do it or not, I'm not real sure." JA 196. Then Boggess stated, ". . . but now whether or not I could actually go through with *murder*—with killing another person or taking another person's life, I just don't know. I'd have trouble with that." JA 197 (emphasis added). Additionally, Boggess had indicated on her juror questionnaire that she had testified as a defense witness at her nephew's theft trial. JL 43. The State exercised a peremptory challenge to remove Boggess, citing as reasons for the strike her hesitancy about assessing a death sentence and the fact that she had served as a defense witness in her nephew's theft trial. JA 211.

Venire member Wayman Kennedy stated on his juror questionnaire that he believed in the death penalty "only in extreme cases." JL 51. He echoed that sentiment during individual voir dire, stating that he really only believed in the death penalty for mass murders or cases involving mutilation. JA 216. Kennedy questioned whether the death penalty could be appropriate punishment for a murder committed in the course of a robbery: "To me, it would like, if it was just a normal robbery, why wouldn't a life sentence be enough. . . ." JA 217. Finally, when asked whether he could answer the special issues "yes" if proved beyond a reasonable doubt, even if he personally felt the defendant should not be sentenced to death, Kennedy replied, "I think I could. . . ." JA 225. The State exercised a peremptory challenge to remove Kennedy, citing his hesitancy to assess the death penalty for murder in the course of robbery (for which Miller-El stood accused), his view that the death penalty is only appropriate for mass murder, and the fact that "he hesitated for a great deal of time" before stating that he could answer the special issues according to the evidence. JA 248-249.

Miller-El does not challenge the State's strikes of the four other African-American venire members. It should be noted, however, that three of the four stated both in their juror questionnaires and during individual voir dire that they were

opposed to the death penalty.[14] They were held qualified under *Wainwright v. Witt* nonetheless based on their statements that they could render a verdict according to the evidence. The fourth of these venire members expressed ambivalence about the death penalty and indicated both in her juror questionnaire and during individual voir dire that she could not personally assess a death sentence.[15]

B. Wide divergence of views on capital punishment of African-American and non-minority venire members

Much of the foundation for Miller-El's *Batson* claim is statistical, i.e., that the State exercised ten of its fifteen peremptory challenges to remove ten of eleven qualified African-American venire members. *See* Petitioner's Brief at 6, 20, 42. Miller-El does not mention, however, the marked disparity between the views of the non-minority venire members and the views of the African-American venire members.

In fact, of those who participated in individual voir dire, more than seventy percent of non-minority venire members had no qualms about either the death penalty generally or their willingness to impose the death penalty in an appropriate case. Only seven of forty-eight non-minority venire members indicated they were opposed to the death penalty;[16] two additional non-minority venire members indicated that, while they believed in the death penalty, they could not personally impose a capital sentence;[17] four additional non-

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[14] Mackey (VDR 10:3949, 3951); Bailey (VDR 11:4110); Keaton (VDR 11:4307-08, 4314).

[15] Baker (VDR 8:2990-91, 2996-97, 2998).

[16] Gibson (VDR 2:485); Nelson (VDR 2:605); Sohner (VDR 2:676); Berk (VDR 3:1449); Dominick Desinise (VDR 3:1483, 1485); Hinson (VDR 4:1649); Evans (VDR 6:2588).

[17] White (VDR 5:2054); Willard (VDR 8:3093).

minority venire members made ambivalent statements during their voir dire examinations about the death penalty or their willingness to impose it.[18]

Conversely, about sixty-seven percent of African-American venire members stated that they were either opposed to the death penalty or unwilling to sentence someone to death.[19] Three additional African-American venire members expressed ambivalence about either the death penalty generally or their willingness to impose it.[20] Only two of fifteen African-American venire members expressed no qualms about either the death penalty generally or their willingness to impose it.[21]

C. The State's consistent treatment of similarly situated venire members

The record shows that the State approached similarly situated venire members on equal grounds. The State pursued challenges for cause to remove numerous non-minority panelists who had expressed opposition to or ambivalence concerning the death penalty.[22] The State secured the excusal by agreement of two additional non-minority venire members who had expressed opposition or ambivalence.[23] Finally,

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[18] Holtz (VDR 2:1018, 1031); Noad Vickery (VDR 4:1571-72, 1574); Girard (VDR 6:2522); Whaley (VDR 10:3748.

[19] Bozeman (JA 79-80); V. Smith (VDR 2:927-928); Butler (VDR 4:1889); Carter (VDR 4:1958); Boggess (JL 44; JA 192, 194); Mosley (VDR 7:2656); Baker (VDR 8:2990-91, 2996); Mackey (VDR 10:3949); Bailey (VDR 11:4110); Keaton (VDR 11:4307-08, 4314).

[20] Warren (JA 139, 140, 142, 144, 146); Rand (JA 161); Kennedy (JA 216, 225).

[21] Fields (JA 108, 111); Woods (JA 255-56).

[22] Nelson (VDR 2:663); Sohner (VDR 2:716-17); Berk (VDR 3:1478); Hinson (VDR 4:1696); White (VDR5:2101); Willard (VDR 8:3153).

[23] Girard (VDR 6:2542, 2575); Evans (VDR 6:2638).

when challenges for cause were unavailing, the State peremptorily struck three non-minority venire members who had expressed opposition to or ambivalence concerning the death penalty.[24] Significantly, the State also peremptorily struck a non-minority venire member who had expressed a firm belief in the death penalty but who also stated that she would probably not assess a death sentence if she believed there was a chance the defendant could be rehabilitated.[25]

None of the non-minority venire members who were selected to serve on Miller-El's jury shared views or circumstances comparable to those of the challenged African-American panelists. Sandra Hearn stated firmly both in her juror questionnaire and throughout individual voir dire that she believed in the death penalty and could assess the death penalty in an appropriate case. VDR 11:4541, 4580-81. While she expressed a belief that someone should not be sentenced to death on a first offense, she made it clear that the prior offense would not have to be a murder, it could be a robbery or some other lesser criminal act of violence. VDR 11:4541-43, 4562. She stated that she personally felt the death penalty should be available for not only murder, but also severe torture and extreme child abuse. VDR 11:4544. Hearn also volunteered that she had a great deal of respect for police officers based on the facts that her father was a retired FBI agent and that she had daily contact with police officers through her employment. VDR 11:4570-72, 4578. Defense counsel apparently recognized that Hearn was a prosecution-prone venire member, submitting her for challenge for cause on numerous grounds.[26] VDR 11:4610. When the trial judge

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[24] Gibson (VDR 2:485, 523); Holtz (VDR 2:1018-19); Whaley (VDR 10:3748).

[25] Crowson (VDR 3:1211).

[26] Furthermore, as the prosecutor testified at the *Batson* hearing, Hearn may well have been struck by the State as a "marginal" juror had she been examined earlier in the jury selection process. JA 862.

found her qualified, defense counsel objected to her being seated as a juror and asked for additional peremptory challenges.[27]

Likewise, juror Marie Mazza's views regarding the death penalty were qualitatively different than those held by the challenged African-Americans. Mazza had indicated on her juror questionnaire that she believed in the death penalty. When asked about her feelings concerning the death penalty during individual voir dire, she stated, "It's not an easy one and I feel that it depends upon the case, the testimony. . . . It's kind of hard determining somebody's life, whether they live or die, but I feel that is something that is accepted in our courts now and it is something that—a decision that I think I could make one way or the other. . . . Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult." VDR 5:2310-11. Nonetheless, Mazza subsequently denied that these feelings were grounded in her religion or upbringing. VDR 5:2312. She ultimately admitted that her hesitance was grounded in concern for what her acquaintances who were opposed to the death penalty would think of her if she served on a capital jury rather than her own internal views regarding the death penalty. VDR 5:2312. Thereafter, Mazza stated that the death penalty exists for a reason, commenting that murderers gave their victims no mercy. VDR 5:2314. For the remainder of the examination, Mazza expressed no hesitancy concerning her ability to assess a death sentence in an appropriate case. VDR 5:2314, 2317-18. In contrast, African-American venire member Warren was so extremely noncommital in his responses to the State's questioning that it is difficult to determine what his views were. JA 139, 140, 142, 144, 146.

[27] The defense had expended its last peremptory challenge to remove the previous venire member, Max O'Dell. VDR 11:4526.

And when asked whether he could impose the death penalty, African-American venire member Rand responded "right now I say I can, but tomorrow I might not." JA 161.

The record also shows that Ronald Salsini was a prosecution-friendly venire member, at least in this case. When asked about his views regarding capital punishment during individual voir dire, Salsini stated, "I believe in the death penalty because it is a good deterrent and everything—the only deterrent for a crime like that. As far as—is it my decision as far as on a jury, I think I could make the decision, but I would really have to think about it long and hard before I could make that decision." VDR 5:2248. While Salsini did make some comments that could be construed as hesitance about assessing a death sentence in certain circumstances, VDR 5:2249, 2251, 2254, one particular portion of his voir dire clearly set him apart from the challenged venire members. When asked what types of crimes he felt might warrant a death sentence, Salsini, a former bank teller, volunteered a hypothetical crime that eerily parallels the facts of this case:

> If after [the victim complies with the robber's demands], then a person would shoot them with no real reason or, you know, if there was a threat to the person committing the crime—say he's committing the crime and he's an armed robber and there is no threat to him at all and he stills go ahead and shoots somebody and kills them, that I think should be punished with capital.

VDR 5:2256. The State accepted Salsini as a juror and the defense struck him.

Similarly, the non-minority jurors who Miller-El claims held pro-defense views concerning rehabilitation are not situated similarly to African-Americans struck on this basis.[28]

[28] The State cited views on rehabilitation as grounds for the strikes of only two African-Americans: Bozeman and Fields. Furthermore, as discussed above, their views on rehabilitation did not provide the sole basis for the strike in either case.

Again, juror Hearn stated unequivocally that, while she believed someone should not be sentenced to death for a first offense,[29] she could base a death sentence on the facts of the crime and evidence of prior violent crimes. VDR 11:4541-43, 4562. In contrast, Bozeman testified that he did not believe the death penalty should be imposed as long as there was a chance the defendant could be rehabilitated and that evidence of prior violent conduct was not necessarily an indication that a person was beyond rehabilitation.[30] JA 79, 89. Juror Kevin Duke also expressed clear support for the death penalty and confidence in his ability to assess it in an appropriate case, VDR 8:3264-66, and his positive views about rehabilitation were made not in the context of testing Duke's ability to assess a capital sentence, but in response to defense counsel's questioning of the juror's ability to disregard the possibility of parole in assessing the minimal allowable sentence (five years) for the lesser-included offense of simple murder. VDR 8:3313-14. Fields' views concerning rehabilitation stand in sharp contrast to those of any other prospective juror of any race because his views were rooted in his deeply held religious belief that all persons can be rehabilitated. JA 118.

Finally, the non-minority venire members who had family members with criminal backgrounds are clearly distinguishable from those African-Americans whom the State struck on

[29] As Hearn stated, "I think when a murder is committed, whether it is purposely or—a sixteen year old boy or something, this is his first offense, no I do not believe in the death penalty there. I think that he ought to be given a chance to have rehabilitation." VDR 11:4583-84.

[30] Bozeman's views were even more extreme than those of Penny Crowson, a non-minority venire member whom the State peremptorily struck. Crowson had expressed a firm belief in the death penalty but also stated that she would probably not assess a death sentence if she believed there was a chance the defendant could be rehabilitated. VDR 3:1211.

this basis.[31] Noad Vickery testified that his sister had been arrested and had served time in a California penitentiary when he was a teenager. VDR 4:1601-02. Vickery was fifty years old at the time of jury selection.[32] JL 65. Cheryl Davis testified that her husband had been convicted of theft in Dallas County ten years earlier and had received a seven-year probated sentence.[33] VDR 9:3469-70. Chatta Nix testified that her brother, who owned a construction company, had recently entered into a plea bargain with the United States Attorney's Office for his involvement in a well-known white-collar construction loan scandal. VDR 5:2379-80. Nix, who worked as office manager at her brother's company, had also been named in a separate civil lawsuit along with "thousands of others" filed by the Federal Savings and Loan Insurance Corporation.[34] VDR 5:2380-82. Finally, Joan Weiner testified that her ten-year-old son had once been arrested for

[31] The State cited the criminal histories of family members as grounds for the strikes of only two African-Americans: Fields and Boggess. Furthermore, as discussed above, this did not provide the sole basis for the strike in either case.

[32] The defense submitted Vickery for challenge for cause on the basis that he could not assess the minimum sentence for the lesser-included offense of murder. VDR 4:1626. After the trial judge held that Vickery was qualified, the defense exercised a peremptory challenge to remove him from the panel. VDR 4:1632, 1635-36. While defense counsel did not provide any reason for striking Vickery, it is apparent even on a cold appellate record that Vickery did not like defense counsel.

[33] The balance of Davis' voir dire examination reveals that she was otherwise a strong State's juror. VDR 9:3433-3499. The defense submitted Davis for challenge for cause on the basis that she could not assess the minimum sentence for the lesser-included offense of murder. VDR 9:3478. After the trial judge held that Davis was qualified, the defense exercised a peremptory challenge to remove her from the panel. VDR 9:3491, 3499.

[34] Nix's voir dire examination indicates that she was otherwise a strong State's juror. VDR 5:2345-2399. The defense exercised a peremptory challenge to remove her from the panel. VDR 5:2399.

shoplifting and she had to pick him up at the police station.[35] VDR 5:2141, 2158. These circumstances are qualitatively different from those of Fields and Boggess. Fields' brother had served time in prison numerous times for drug convictions in Dallas County. JA 124. Boggess had testified as a defense witness at her nephew's theft trial. JL 43.

D. Disparate questioning of venire members based on venire members' views, not race

The record in this case reveals that the State's litmus test for prospective jurors was their views on capital punishment. This was the most significant motivating factor in not only its exercise of challenges for cause and peremptory challenges but also its questioning of prospective jurors. Prosecutors employed disparate questioning to ferret out venire members whom they felt might hesitate when it came to imposing the ultimate punishment. They also employed disparate questioning in attempts to disqualify venire members who had expressed what prosecutors perceived to be unfavorable views but who were not subject to disqualification on those grounds. However, they did not employ disparate questioning based on race. Rather, prosecutors utilized these legitimate jury selection tactics, aiming to identify and remove prospective jurors who had expressed views unfavorable to the State.

As Miller-El asserts, the prosecution used divergent questioning methods in two areas: venire members' feelings about the death penalty and venire members' ability to impose the minimum punishment for the lesser-included offense of murder.

The State questioned all prospective jurors at length regarding their views on capital punishment. With the vast majority of venire members, prosecutors simply informed

[35] Weiner served on Miller-El's jury.

them that the State was actively seeking the death penalty and that affirmative answers by the jury to the three questions submitted at the punishment phase would result in Miller-El being given the death penalty, then asked them an open-ended question concerning their feelings on capital punishment. With some prospective jurors, however, prosecutors described an execution in vivid detail, no doubt, as Miller-El contends, "to prompt more negative feelings about service in a death case" in hopes of disqualifying the jurors on legal grounds. Petitioner's Brief at 14. Nonetheless, the record does not support Miller-El's argument that this disparate questioning was based on race.

The African-Americans questioned with the "graphic script" at the outset of their examinations had expressed reservations about the death penalty in their juror questionnaires. On her questionnaire, Carrol Boggess answered affirmatively the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" JL 44. Wayman Kennedy stated on his questionnaire that he believed in the death penalty "only in extreme cases." JL 51. Linda Baker stated on her questionnaire "[m]y strongest feeling is against the death penalty" and wrote "undecided" in response to the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" Defense Exhibit ("DX") 7.[36] Troy Woods wrote "no" in response to the question "Do you believe in the death penalty?" JL 180. Janice Mackey wrote "no" in response to the question "Do you believe in the death penalty?" and added "Thou shall not kill." DX 7. In response to the question "Do you believe in

[36] This exhibit may be found in the record of the *Swain* hearing conducted on March 12, 1986.

the death penalty?" Paul Bailey circled "yes" then wrote in "no." DX 7. Anna Keaton wrote "no" in response to the question "Do you believe in the death penalty?" DX 7.[37]

Likewise, some non-minority jurors who had expressed reservations about the death penalty were questioned using the same graphic formulation.[38] For both African-American and non-minority panelists, however, not all panelists who had expressed reservations about the death penalty were questioned with the graphic formulation.[39] On the other hand, venire members who had not expressed reservations about the death penalty in their juror questionnaires, whether African-American or white, were not given the "graphic script" at the outset.[40]

The State also did not question African-Americans differently than non-minority venire members concerning their willingness to impose the minimum punishment for the lesser-included offense of murder.[41] Again, prosecutors did

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[37] Jeanette Butler's juror questionnaire is not contained in the record. However, her voir dire examination reveals that while she believed in the death penalty in principle, she was unwilling to participate as a juror in imposing a death sentence. VDR 4:1889.

[38] Desinise (VDR 3:1483-84); Evans (VDR 6:2585-86). Prospective juror Sztybel was also questioned with the graphic formulation even though she had never expressed reservations about the death penalty. (VDR 7:2828)

[39] Gibson (VDR 2:483); Nelson (VDR 2:603); V. Smith (VDR 2:926); Holtz (VDR 2:1016-17); Berk (VDR 3:1440-41); Hinson (VDR 4:1646); Carter (VDR 4:1951-52); White (VDR 5:2053); Girard (VDR 6:2520-21); Mosley (VDR 7:2654-55); Willard (VDR 8:3090-91).

[40] Bozeman (JA 77-78); Fields (JA 106-107); Warren (JA 137); Rand (JA 157-158).

[41] Unlike the "graphic script" questioning, which occurred at the outset of an examination, the minimum punishment questioning generally occurred toward the end of the examination; therefore, the State had not only the prospective juror's questionnaire to consider but also his previous voir dire responses.

utilize disparate questioning, but not based on race. With most venire members, prosecutors identified the minimum penalty first, then asked whether the venire member could impose it. But with some, prosecutors employed a tactic by which they described the offense of murder, then asked what the prospective juror thought the minimum punishment should be, before informing him of the range allowed by law. However, the State did not engage in this divergent questioning based on race. The record clearly shows that the prosecution employed this tactic with several venire members, both African-American and not, who had expressed views that, while not rendering them subject to a challenge for cause, were unfavorable to the State.[42]

On this point, Miller-El makes two serious misstatements of the record. First, he asserts that the State used this tactic "with all but one of the African-American jurors." Petitioner's Brief at 17. In fact, prosecutors employed this line of questioning with only seven of fifteen African-American venire members.[43] Furthermore, all the venire members questioned in this manner, whether African-American or not, had expressed views unfavorable to the prosecution. Miller-El further contends that the State employed the friendlier line of questioning "[w]ith forty-seven of forty-nine white jurors," Petitioner's Brief at 17, but the record shows that only thirty-four white jurors were questioned in this manner.[44] Twelve white jurors were not

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[42] Bozeman (JA 94-95); Fields (JA 121-22); Gibson (VDR 2:507-11); Holtz (VDR 2:1046-50); Warren (JA 148); Rand (JA 165); Boggess (JA 204-05); Kennedy (JA 225, 226); Baker (VDR 8:3007-08); Fernando Gutierrez (VDR 11:4396).

[43] Bozeman (JA 94-95); Fields (JA 121-22); Warren (JA 148); Rand (JA 165); Boggess (JA 204-05); Kennedy (JA 225, 226); Baker (VDR 8:3007-08).

[44] Don Hambrick (JA 280-83); Emily Williams (JA 285-87); Darol Weigant (JA 289-91); Mary Sumrow (VDR 1:356-57); Carol Taylor (JA

questioned at all on the issue of minimum punishment.[45] Two white jurors were questioned using the formulation challenged by Miller-El.[46]

In contrast, the majority of African-Americans expressed reservations about the death penalty, so the majority of African-Americans were questioned in a manner intended to either identify them as unfavorable jurors or disqualify them from jury service. For instance, African-American juror Troy Woods had indicated on his juror questionnaire that he did not believe in the death penalty. JL 180. Therefore, not surprisingly, the State led off its examination of Woods with a graphic description of an execution. JA 252. However, once it became clear that Woods was, in fact, a prosecution-friendly juror—that his expression of opposition to the death penalty was grounded, not in any personal or moral opposition to capital punishment, but in his belief that lethal injection was too lenient a mode of punishment—the State sought to qualify him on minimum punishment as it had all other prosecution-friendly venire members. JA 264-266.

362-64); Billy Wagoner (JA 370-73); Sandra Jenkins (JA 385-87); Colleen Moses (JA 391-92); Penny Crowson (VDR 3:1232); Gwendolyn Smale (JA 398-401); Ronnie Long (JA 403-05); Vickery (433-35); Weiner (JA 506-10); Salsini (JA 514-16); Mazza (JA 519-22); Nix (524-27); Mary Witt (JA 532-34); Doris Williams (JA 545-48); Sztybel (JA 550-53); Charles Smith (JA 556-59); Debra McDowell (JA 569-72); Virginia Webb (JA 576-80); Duke (JA 582-86); Louis Wolters (590-92); Davis (JA 596-98); Gary Spence (JA 602-08); Carol King (JA 612-16); Whaley (VDR10:3768); Catherine Barnard (JA 621-25); Susan Page (JA 628-31); Brenda Walsh (JA 636-39); Russell Jones (JA 645-50); Max O'Dell (JA 686-91); Hearn (JA 694-97).

[45]Nelson (VDR 2:598-631); Sohner (VDR 2:668-98); Berk (VDR 3:1437-68); Hinson (VDR 4:1640-70); White (VDR 5:2050-73); Willard (VDR 8:3088-3119).

[46]Gibson (VDR 2:507-11); Holtz (VDR 1046-50).

E. Jury shuffles

The State requested and received jury shuffles the first, second, and third weeks of jury selection, then declined shuffles the fourth and fifth weeks of jury selection; the defense requested and received shuffles all five weeks. During the first three weeks of jury selection, the jury shuffles were conducted in the central jury room without the trial judge present, pursuant to an agreement between the parties consistent with Dallas County practice. Counsel for the State physically conducted the State's shuffles, and counsel for the defense physically conducted the defense's shuffles.

During the first week, both the State and the defense requested and were granted shuffles, but the record does not reflect the racial makeup of the first week's venire. JA 45-46. On the second week, the State requested a shuffle, and the defense immediately put on the record that four of the first ten venire members were African-American, three of the second ten were African-American, two of the third ten were African-American, and one of the fourth ten was African-American. VDR 2:837. The State's request for shuffle was granted, then the defense requested and was granted a shuffle. VDR 2:837, 839. The record does not reflect the racial composition of the venire either after the State's shuffle or after the defense's shuffle.

On the third week of jury selection, the State requested and received a shuffle, to which the defense did not object, then the defense requested and received a shuffle. JA 57-58. During defense counsel's shuffle in the central jury room, the prosecutor protested, claiming that defense counsel had not shuffled the juror cards thoroughly enough. JA 57-58, 60-61. Defense counsel suggested that the prosecutor take it up with the judge. JA 57, 58, 60-61. After the shuffles were completed, but before the newly shuffled venire was reseated, counsel for both the State and the defense went to the judge's chambers; the prosecutor informed the judge that he had a

problem with the way the defense had conducted its shuffle, but that he was still investigating the issue. JA 59. He lodged no formal objection at that time. JA 59. The panel was seated, then the judge excused the last sixteen jurors to return to the central jury room, conducted some general voir dire, distributed questionnaires, and recessed the panel for lunch. VDR 4:1697-1777.

At that point, the State formally objected to the defense's shuffle, asking that the panel be either reshuffled or quashed; the prosecutors, in accordance with state law, essentially argued that when the State protested the manner in which defense counsel conducted his shuffle, the parties' agreement to conduct shuffles outside the courtroom terminated.[47] JA 57, 63. Defense counsel responded: "[W]hat this is really all about is that jurors number one, two, three, four and eight and fifteen on the first list were all black, that when they went down and shuffled the first time, the black jurors were number nineteen, twenty-six, thirty-six, thirty-seven, thirty-eight, and thirty-nine, that after the second shuffle those same six blacks are now one, two, three, four, seven, and fourteen. That's what this is all about." JA 61-62. But, as the prosecutor noted, he had voiced his complaint during the defense's shuffle, before he had even seen the array or knew in what order the venire members would be seated. JA 62. The trial judge denied the State's request to reshuffle or quash the panel, finding that the State had failed to object to the defense's shuffle in a timely manner. JA 64-65.

Any problems of improper shuffling were remedied during the fourth and fifth weeks of jury selection when the defense's shuffles were conducted under the trial judge's

[47] Texas law as it existed at the time of Miller-El's trial dictated that a shuffle conducted outside the courtroom without consent of the parties was not a valid shuffle under Article 35.11 of the Texas Code of Criminal Procedure. *Latham v. State*, 656 S.W.2d 478, 480 (Tex. Crim. App. 1983); *Stark v. State*, 657 S.W.2d 115, 116 (Tex. Crim. App. 1983).

supervision in his chambers.[48] VDR 6:2472, 9:3585-86. The record does not reflect the racial composition of these panels, but does show that of the fourteen prospective jurors examined during the fourth week, two were African-American; and of the fifteen prospective jurors examined during the fifth week, four were African-American, one was Filipino-American, and one was Latino.

II. THE *SWAIN* HEARING IN STATE COURT

On March 9, 1986—just four days after Miller-El's jury was empaneled—the *Dallas Morning News* ran a front-page story about jury selection practices in Dallas County criminal cases. JA 698. This article prompted defense counsel to file a motion to quash the jury panel based on this Court's opinion in *Swain v. Alabama*, 380 U.S. 202 (1965). The trial court held a hearing on the motion on March 12, 1986. JA 723.

A. Evidence admitted at the hearing

Former assistant district attorney John Sparling[49] testified regarding a paper on jury selection that he wrote in 1969 for a lecture he gave a small group of misdemeanor prosecutors, and which was ultimately included in a larger manual used to train misdemeanor prosecutors. Sparling testified that the manual was no longer circulated in 1986. JA 739-40. The paper, in its introduction, stated that it contained "one prosecutor's ideas on some things that need to [be said] to [the] panel, and some things to look for in a juror." JA 30. The paper advised that "[w]ho you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the defendant. . . ." JA 30. It went on to state that

[48] The State declined shuffles during the fourth and fifth weeks.

[49] Sparling was a prosecutor in the Dallas County District Attorney's Office from 1968 to 1981.

"[y]ou are not looking for any member of a minority group which may subject him to oppression" because "[m]inority races almost always empathize with the [d]efendant."[50] JA 32; *see also* JA 742. At the hearing, Sparling testified further that he believed the underlying reasoning of the paper—that a prosecutor does not want anyone on the jury unless he believes they will convict—has not changed since 1969. JA 744. But according to Sparling, a great deal of the information contained in the paper was outdated in 1986, including the remarks about minority jurors.[51] JA 743, 748.

District Judge Jack Hampton[52] testified that as a misdemeanor prosecutor in Dallas County in 1958, he was once reprimanded by either the District Attorney or the First Assistant for allowing an African-American to serve as a juror in a misdemeanor DWI case after the juror held out and forced a mistrial.[53] JA 762. From that time until he left the District Attorney's Office in 1962, he never allowed another

[50] The paper also counseled against selecting older women who wear too much make-up because they are usually unstable, and extremely overweight people, especially young men and women, because they lack self-discipline and are sometimes unstable. JA 33.

[51] As Sparling explained, "Well, my attitude was that, in 1969, that there were certain, either groups of people that may either actually be, or perceive themselves as being oppressed by the state, being discriminated against. The thought being: If they were, in fact, discriminated against, and if they had, in fact, been oppressed by the state, normally they might take it out against the State. In 1969 things—our world has changed drastically since 1969. I don't need to tell you that. But there was a lot going on in 1969 that is not going on in 1981 or 1986." JA 744.

[52] Judge Hampton was a misdemeanor prosecutor in the Dallas County District Attorney's Office from 1957 to 1962. JA 758-59. He was in private criminal defense practice until he took the bench in 1981. JA 758.

[53] Judge Hampton denied that the person who reprimanded him used the term "nigger." JA 766. *See* Petitioner's Brief at 3 (quoting former Dallas County District Attorney Henry Wade as telling Hampton, "If you ever put another nigger on a jury, you're fired.").

African-American to sit on a jury unless he ran out of peremptory strikes. JA 760. Nonetheless, Judge Hampton testified that, even in 1962, it was not the policy of the District Attorney's Office to exclude people from juries solely because of their race. JA 763.

District Judge Larry Baraka,[54] an African-American, testified regarding an instance in 1985 when he reprimanded a prosecutor for what he believed to be discriminatory jury selection practices. JA 769. That prosecutor was not involved in jury selection in Miller-El's case. JA 768. Judge Baraka testified further that as an assistant district attorney from 1976 to 1978, he did see African-Americans on juries, but he tended to see more white jurors. JA 769-70. While he believed some individual prosecutors may have systematically excluded African-Americans from juries during that time, he did not believe it was the policy of the office to exclude African-Americans from juries. JA 772. When asked by defense counsel whether he believed prosecutors had engaged in systematic exclusion of African-Americans from juries, Judge Baraka responded, "I would say in the past, yes." JA 770. Finally, Judge Baraka testified that, to the best of his recollection, the training manual he received when he attended the training course for misdemeanor prosecutors in 1977 did not contain the paper written by John Sparling. JA 774.

Ralph Tait,[55] chief public defender in Dallas County, testified that, as a defense attorney, he "routinely warn[ed]

[54] Judge Baraka joined the Dallas County District Attorney's Office as a misdemeanor prosecutor in 1976. JA 768. In 1978, after being promoted to felony prosecutor, he left the District Attorney's Office and entered private criminal defense practice. He took the bench a little more than a year before Miller-El's trial. JA 768.

[55] Tait was a misdemeanor prosecutor with the Dallas County District Attorney's Office from 1966 to 1968. JA 776. He then entered private criminal defense practice in Dallas.

black clients that juries are widely composed of mostly white housewives and red-necks from the suburbs who have very little contact with them." JA 775. Tait testified, nonetheless, that he recalled no office policy of excluding African-Americans from juries when he served as a misdemeanor prosecutor in the District Attorney's Office from 1966 to 1968. JA 776. While "back then" some individual prosecutors thought it was important to exclude African-Americans from juries, it was not policy. JA 776.

District Judge Harold Entz[56] testified that, while a prosecutor in the District Attorney's Office from 1967 to 1969, he selected juries with African-Americans and he knew of no policy to exclude African-Americans from juries. JA 787. He testified further that, as a judge, he had once discovered that a prosecutor's request for a jury shuffle was prompted by the fact that there were numerous African-Americans toward the front of the panel. JA 788. That instance did not involve the prosecutors in Miller-El's trial. JA 789. Judge Entz also testified that the prosecutors in Miller-El's trial had tried cases in his court and he was aware of no instances in which they had systematically excluded minorities. JA 789.

District Judge Ed Kinkeade[57] testified that, in light of the *Dallas Morning News* article, he had proposed to other judges that they inform prosecutors at the outset of jury selection that exclusion of minority jurors solely for racial reasons would not be tolerated. JA 791. He already had a policy in place in his courtroom of requiring prosecutors to put on the record the reasons for their strikes of minority venire members if

[56] Judge Entz was a prosecutor with the Dallas County District Attorney's Office from 1967 to 1969. He entered private criminal defense practice, then took the bench in 1974. JA 786

[57] Judge Kinkeade was licensed in 1974 and took the bench in 1981. JA 790.

they did not question those venire members. JA 792. Judge Kinkeade also noted that, in his experience, only some prosecutors appeared to strike jurors based on race. JA 793.

Defense attorney John Stauffer[58] testified that while he was a prosecutor at the District Attorney's Office from 1964 to 1979, it was never the office's policy to exclude African-Americans or any other minority from juries based on race. JA 800. In fact, Stauffer testified that, as a prosecutor, he had tried cases with African-American jurors, including a capital case in 1970 or 1971, in which an African-American defendant was accused of killing a white person. JA 798. While this was not the first time an African-American had served as a juror in a capital case in Dallas County, Stauffer believed it was the first time an African-American juror sat in a capital case involving an African-American defendant and a white victim. JA 799. Stauffer, who was responsible for gathering materials for the training manual in 1969, testified that John Sparling's paper did not reflect the policy of the office; neither the manual as a whole, nor the Sparling paper in particular, were ever reviewed or endorsed by the District Attorney. JA 801-802. Rather, the paper represented the ideas of one prosecutor on how voir dire should be conducted. JA 800. According to Stauffer, Sparling's paper remained in the manual until 1976, when the Texas District and County Attorneys Association took over the task of distributing it. JA 804. He did not recall whether the Sparling paper remained in the manual after that. JA 804.

At the conclusion of the hearing, the trial judge found that there was no evidence presented indicating any systematic exclusion of African-Americans as a matter of policy by the District Attorney's Office and that Miller-El had failed to establish a *Swain* violation.

[58] Stauffer had been a prosecutor in the Dallas County District Attorney's Office from 1967 to 1979. He then entered private criminal defense practice. JA 795.

B. Evidence not before the trial judge

The *Dallas Morning News* articles, and the statistics they contained, upon which Miller-El now relies,[59] were not admitted into evidence at the *Swain* hearing. Rather, the trial judge excluded them as hearsay.[60] JA 809. The trial judge had granted the newspaper's motion to quash subpoenas issued to its reporters on First Amendment grounds. JA 723-25, 806. This ruling prompted defense counsel to request that he be allowed to make an offer of proof of the newspaper articles, which the trial court allowed. JA 806. Defense counsel further requested that the record be held open to allow his investigator an opportunity to duplicate the statistical analyses conducted by the *Dallas Morning News* reporters. JA 808. The judge granted the request, but noted that the State would be given an opportunity to rebut any information the defense was able to amass. JA 808. Miller-El never presented additional evidence.[61]

Also not before the trial court were two state court opinions reversing convictions based on *Batson*.[62] *See* Petitioner's Brief at 5. These opinions, which were issued in 1989 and 1990, were clearly not before the trial court either at the *Swain* hearing in 1986 or at the *Batson* hearing in 1988.

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[59] *See* Petitioner's Brief at 4-5.

[60] The only portions of the articles admitted into evidence were excerpts quoting John Sparling, who testified at the hearing, utilized by defense counsel during his examination of Sparling. JA 753-754. As the prosecution objected, "[W]e are not about to agree that the newspapers article is probative evidence of anything." JA 809.

[61] Miller-El refers to the statistical data contained in the newspaper articles as "uncontested." Petitioner's Brief at 45. But the record shows clearly that the reason the data was never disputed by the State at trial was because it was never admitted.

[62] *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989); *(Dorothy) Miller-El v. State*, 790 S.W.2d 351 (Tex. App.—Dallas 1990).

Finally, also not before the trial court was a 1963 treatise on jury selection relied upon by Miller-El. *See* Petitioner's Brief at 3-4.

III. THE *BATSON* CLAIM IN STATE COURT

The case proceeded to trial and Miller-El was convicted of capital murder on March 26, 1986. One month later, this Court issued its opinion in *Batson*.

On direct appeal, Miller-El challenged his jury selection under the *Batson* standard. The Texas Court of Criminal Appeals found that Miller-El had established a prima facie claim under *Batson's* first step based on the disproportionate number of African-Americans stricken. *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988). The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

At the *Batson* hearing, conducted on May 10, 1988, the defense relied on the evidence it had presented at the *Swain* hearing without offering any trial-related evidence more applicable in a *Batson* context.[63] JA 840. The State objected to its admission, arguing that the evidence was irrelevant under *Batson* since it did not bear on the prosecutor's conduct in Miller-El's case. JA 842. The court overruled the State's objection, however, and admitted the evidence, commenting that "[w]hat weight, if any, I will give it, I certainly reserve for myself." JA 843. Prosecutor Paul Macaluso testified regarding his reasons for striking venire members Paul Bailey and Joe Warren, for whom no reasons had been given at

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[63] Miller-El did not advance his disparate treatment and disparate questioning arguments until federal habeas corpus proceedings. Nonetheless, the trial court specifically found, based on its own recollections and on its review of the entire voir dire record, that the prosecutors did not engage in disparate treatment or disparate questioning based on race. *See* JA 878.

trial,[64] and the State asked the court to take judicial notice of the explanations given during voir dire for its strikes of the remaining venire members. JA 866. Thereafter, the court issued written findings, determining that the prosecution's explanations were race-neutral and negated any inference of purposeful discrimination. JA 873-878.

Miller-El challenged these findings on direct appeal. The Texas Court of Criminal Appeals, after independently reviewing the voir dire and the supplemental record, found that the record contained "ample support" for the prosecutor's racially neutral reasons and concluded that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." JA 881.

IV. FEDERAL HABEAS PROCEEDINGS

Miller-El advanced his *Batson* claim again in his federal habeas petition. A United States magistrate judge recommended denying habeas corpus relief, concluding that the record supported the trial judge's finding that Miller-El had failed to prove purposeful discrimination. JA 920. After conducting a de novo review of the magistrate's disposition and hearing arguments from counsel, the district judge denied relief based on the magistrate's findings and recommendation. JA 942. The United States Court of Appeals for the Fifth Circuit denied Miller-El's request for a certificate of appealability, concluding, in light of the presumptively correct state court finding of no purposeful discrimination, "that this issue would not be debatable among jurists of reason, that courts could not resolve the issues in a different manner, and that the issue does not deserve encouragement to proceed further." JA 961.

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[64] Defense counsel had failed to object to the State's exercise of peremptory strikes against Bailey and Warren at the time of the strikes; therefore, the State had not offered race-neutral reasons.

SUMMARY OF THE ARGUMENT

Miller-El has failed to overcome the trial judge's finding that prosecutors did not discriminate against African-American venire members based on race. The trial judge, who observed firsthand the entire jury selection process, including the demeanor of the prosecutors and prospective jurors, credited the prosecutors' race-neutral, case-related reasons for striking African-American venire members, and the record fully supports that credibility determination. Each African-American peremptorily challenged by the State had voiced views unfavorable to the State. Furthermore, the record reflects that prosecutors treated similarly situated venire members equally, examining them based on their individual views and circumstances, not based on their race. Finally, the trial judge was certainly entitled to determine that Miller-El's evidence of historical discrimination in Dallas County was simply not sufficient to overcome the evidence in this case that prosecutors struck prospective jurors, not because of their race, but because of their unfavorable case-related views.

Additionally, the court of appeals applied the correct standard in determining that Miller-El failed to make a substantial showing of the denial of a constitutional right and, thus, that he was not entitled to a certificate of appealability. The court of appeals' opinion properly analyzed the merits of Miller-El's claim, in light of the applicable standard of review, and determined that the issue would not be debatable among jurists of reason and that courts could not resolve the issue in a different manner.

Finally, the lower court's consolidation of subsections (d)(2) and (e)(1) was entirely permissible in this case. The lower federal courts agree that the inquiries of these two subsections, both of which govern federal courts' review of state court factual determinations, are necessarily intertwined, and the provisions must be read in conjunction with one

another. It was unnecessary to accord these subsections independent treatment when resolution of Miller-El's *Batson* claim hinged on a single state court fact finding.

ARGUMENT

I. MILLER-EL HAS FAILED TO SHOW THAT THE STATE COURTS' REJECTION OF HIS *BATSON* CLAIM IS UNREASONABLE.

A. A trial judge's finding at *Batson*'s third step is entitled to great deference.

Batson v. Kentucky introduced a three-step evidentiary framework for evaluating claims of racial discrimination in jury selection. 476 U.S. at 96-98. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.* at 96-97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to provide a race-neutral explanation for striking the venire member in question.[65] *Id.* at 97-98. Third, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98. Under *Batson*, the ultimate burden of persuading the court that the State's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. 476 U.S. at 94 n.18 (citing *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981)); *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

In this case, there is no dispute that Miller-El presented a prima facie claim under *Batson*'s first step. Nor is there any dispute that the prosecution presented facially race-neutral

[65] To satisfy the second part of the three-step analysis, the prosecutor need only give an explanation based on something other than race. *Hernandez v. New York*, 500 U.S. 352, 359 (1991). "Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* Moreover, the reason offered need not rise to the level of a challenge for cause. *Batson*, 476 U.S. at 97.

reasons for exercising each peremptory challenge. Solely at issue is Miller-El's disagreement with the trial court's ultimate determination at *Batson*'s third step that the prosecutors' reasons were credible and that no purposeful discrimination occurred. Miller-El has failed to overcome that determination.

A trial judge's factual finding at *Batson*'s third step is necessarily accorded great deference on appellate review. Even on direct review, a reviewing court may overturn a state trial court's finding on the issue of discriminatory intent only if it is convinced that the determination was clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality); *see also id.* at 372 (O'Connor, J., joined by Scalia, J., concurring) (agreeing with plurality that Court reviews for clear error trial court's finding as to discriminatory intent). And where, as here, the claim is before the Court on federal habeas review, the trial judge's determination must be upheld unless it is unreasonable. 28 U.S.C. § 2254(d)(2).

The deferential treatment of the trial judge's determination is grounded in the obvious advantage he has over reviewing courts in assessing the facts. He has witnessed the entire jury selection process as it has unfolded, in this case over the expanse of more than a month. He has had the unique advantage of observing the demeanor of both prosecutors and prospective jurors. Indeed, in the *Batson* context, the trial judge is essentially a witness to the very conduct alleged to be discriminatory. The credibility of the prosecutor is the deciding factor in a *Batson* claim, *Batson*, 476 U.S. at 98 n.21, and "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within the trial judge's province.'" *Hernandez*, 500 U.S. at 365 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). Equally critical to the trial judge's appraisal of the prosecutors' credibility is the trial judge's observations of venire members. "The manner of the juror while testifying is oftentimes more

indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." *Patton v. Yount*, 467 U.S. 1025, 1037 (1984) (citation and quotation omitted). Thus, a trial judge's ability to witness prospective jurors' "[d]emeanor, inflection, [and] the flow of the questions and answers" places him in the best position to gauge whether the prosecutors' reasons for striking particular jurors were credible or pretextual. *Id.* at 1038 n.14.

From this superior vantage point, the trial judge in this case found that the prosecutors did not discriminate against African-American venire members; that none of the explanations given by the prosecutors were based on race; that none of the prospective jurors were questioned perfunctorily; that there was no disparate examination of prospective jurors; and that the reasons given for the prosecutors' peremptory challenges were closely and directly related to the facts of the case. JA 877-78. These findings are abundantly supported by the record of voir dire proceedings in this case.

B. The trial judge's finding of no purposeful discrimination is amply supported by the voir dire record.

Throughout jury selection in this case, prosecutors followed a consistent voir dire strategy of identifying and removing prospective jurors who expressed opposition to or hesitancy about the death penalty. This strategy motivated the prosecutors' questioning of prospective jurors, their pursuit of for-cause challenges, and their exercise of peremptory challenges.

It was the divergence of views of minority versus non-minority venire members, rather than any impermissible discriminatory purpose, that resulted in the racial disparity in the State's exercise of its peremptory strikes. Of the venire members called for jury service in this case, more than seventy percent of non-minority venire members had no

qualms about either the death penalty generally or their willingness to assess it in an appropriate case. *See supra* at 9. Conversely, only two of fifteen African-American venire members expressed no qualms about the death penalty. *See supra* at 10.

Plainly, the mere fact that the impact of the State's legitimate voir dire strategy bore more heavily on African-American venire members does not prove purposeful discrimination. In addressing a *Batson* claim, a reviewing court "must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'" *Hernandez*, 500 U.S. at 359-360 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977)). *See also McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("[A] defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination.").

Here, the prosecutor struck jurors who had expressed views unfavorable to the State, regardless of their race. In light of the divergence of views between minority and non-minority venire members, the bare racial disparity of the prosecutors' strikes lends little support to Miller-El's claim of purposeful discrimination. *See Easley v. Cromartie*, 532 U.S. 234, 243, 258 (2001) (reversing finding of equal protection violation in redistricting plan where evidence showed high correlation between racial identification and political affiliation); *Bush v. Vera*, 517 U.S. 952, 968 (1996) (O'Connor, J., principal opinion) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify.").

All but one of the challenged venire members expressed ambivalence or hesitance about the death penalty either in their juror questionnaires or during their voir dire examinations; in many instances, there were additional considerations that informed the State's strikes, such as pro-defense views on rehabilitation and the criminal histories of family members. *See supra* at 2-9. The one challenged venire member who had expressed no qualms about the death penalty had expressed pro-defense views regarding rehabilitation and had a brother with an extensive criminal history in Dallas County. *See supra* at 4-5.

Furthermore, that some of the venire members who expressed hesitancy about assessing a death sentence later claimed they would be able to assess the death penalty does not render the prosecutors' strikes illegitimate. While these affirmations effectively insulated them from a challenge for cause, a prosecutor's explanation "need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97. A prosecutor is certainly allowed to conclude that a prospective juror's initial indecision may not bode well for the State. *See Caldwell v. Maloney*, 159 F.3d 639, 655-56 (1st Cir. 1998) ("[T]he prosecutor had no obligation either to ignore [the prospective juror's comments about her reluctance] or to accept at face value [the prospective juror's] prediction that, in the end, [she] could put aside [her] problem and do it right.").

Significantly, Miller-El's argument that the State treated similarly situated white venire members differently is not borne out by the evidence. These kinds of subjective considerations are not easily assessed from a cold record. "The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared. . . ." *United States v. Alston*, 895 F.2d 1362, 1367 n.5 (11th Cir. 1990). Disparate treatment cannot be imputed in every situation where the State rejects one venire member with the same characteristics as another venire member who is accepted.

Indeed, the decision to strike a particular panelist "may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable." *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). *See also Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir. 1997) (noting that both prosecutor and defense counsel must be allowed to make credibility determinations when exercising peremptory challenges). But even on a cold record, it is clear that the State approached similarly situated venire members on equal grounds based on their individual views and circumstances, and not based on race.

Miller-El's attempt to impute discriminatory intent to the prosecutors from their use of particular jury selection tactics is equally unavailing. The fact that African-Americans were subjected to certain lines of questioning in disproportionate numbers is simply a function of the divergence of views between the African-American panelists and the non-minority panelists. Prosecutors utilized the legitimate tactic of disparate questioning to identify and remove prospective jurors who had expressed views unfavorable to the State.

Similarly, Miller-El overstates the significance of the State's requests for jury shuffles and mischaracterizes the record in an attempt to portray the State as scheming to manipulate the jury shuffle process. He ignores the fact that the heart of the State's complaint to the defense's shuffle during the third week of jury selection was that defense counsel failed to shuffle the juror cards thoroughly. *See supra* at 21-22. And he completely omits the fact that prosecutors voiced their complaint to the shuffle before they were even aware of the racial composition of the newly shuffled venire. *See supra* at 22. In any event, any inference that can be drawn from such evidence cannot overcome the highly persuasive race-neutral explanations for the State's strikes, explanations which are supported by the record and were credited by the trial judge.

The voir dire record in this case clearly supports the finding of the trial judge that prosecutors did not exercise peremptory strikes based on race.

C. The trial judge considered all relevant evidence properly before him and determined reasonably that Miller-El failed to prove purposeful discrimination.

Miller-El argues that the trial judge failed to "take proper account" of all relevant evidence in evaluating his *Batson* claim, specifically his pattern and practice evidence. Petitioner's Brief at 42. The cases cited by Miller-El, however, do not require a fact-finder to accord any particular degree of weight, or any weight for that matter, to any type of circumstantial evidence. Rather, these cases simply counsel that all relevant evidence should be considered and that a fact-finder *may* rely upon any relevant circumstantial evidence to arrive at a determination that purposeful discrimination occurred, all the while reaffirming the ultimate principle of deference to the fact-finder. For example, in *Hernandez v. New York*, Justice O'Connor noted in her concurrence that

> [d]isproportionate [strikes of African-American venire members] *may*, of course, constitute evidence of intentional discrimination. The trial court *may*, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination. But if, as in this case, the trial court believes the prosecutor's nonracial justification, and that finding is not clearly erroneous, that is the end of the matter.

500 U.S. at 375 (O'Connor, J., concurring in judgment) (citation omitted; emphases added). Likewise, in *Reeves v. Sanderson Plumbing Product, Inc.*, in which the Court reversed the intermediate appellate court's reversal of the

jury's and trial judge's finding of purposeful discrimination, the Court held that

> [a]lthough the presumption of discrimination [created by the prima facie case] drops out of the picture once the defendant meets its burden . . . , the trier of fact *may* still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.

530 U.S. 133, 143 (2000) (internal quotations omitted; emphasis added).

Moreover, much of the evidence Miller-El now relies on was not even before the trial judge, most notably the statistical data contained in the *Dallas Morning News* articles.[66] *See supra* at 28-29. Clearly, this Court's review is limited to discerning whether the trial judge's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

But even if this evidence were properly before the trial court, it would not impeach the trial judge's decision. In the face of the race-neutral, case-related reasons for the prosecutors' strikes in this case, the statistical data simply is not sufficient to trump the trial judge's credibility assessments. Miller-El's reliance on the opinions in *Chambers* and *(Dorothy) Miller-El* is also futile. Any inference that may be

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[66] Also not before the trial court were two state court opinions reversing convictions based on *Batson*, *see* Petitioner's Brief at 5 (citing *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989); *(Dorothy) Miller-El v. State*, 790 S.W.2d 351 (Tex. App.—Dallas 1990); a recitation of testimony given in another case, upon which Miller-El relies as proof that the training manual still contained the Sparling paper in 1980, *see* Petitioner's Brief at 4 (citing *Ex parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988)); and a 1963 treatise on jury selection relied upon by Miller-El. *See* Petitioner's Brief at 3-4.

drawn from the mere fact that a prosecutor was involved in a single case, among hundreds he tried, that was reversed under *Batson* is insufficient to overcome the trial judge's finding that the State did not discriminate in this case. But in any event, to the extent these opinions indicate that these prosecutors discriminated against African-Americans in another case,[67] the opinions do little to prove that they did likewise in Miller-El's case, particularly in light of the undisputed race-neutral, case-related reasons for the strikes in this case. Additionally, evidence presented in another case that the training manual still contained the Sparling paper in 1980 is in conflict with testimony presented in Miller-El's case that the paper was removed from the manual in 1976. *See* JA 774 (Judge Baraka's testimony). In any event, the paper was no longer in the manual in 1986. *See* JA 741 (Sparling's testimony).

The record belies Miller-El's contention that the trial judge failed to consider all the evidence properly before him, including the pattern and practice evidence admitted at the *Swain* hearing. JA 844. At the *Batson* hearing, the trial judge admitted into evidence, over the State's objection on relevancy grounds, the Sparling paper and all the testimony regarding historical jury selection practices in Dallas County originally admitted at the *Swain* hearing.[68] JA 843. The trial

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[67] It should be noted, however, that in *Chambers*, prosecutor Paul Macaluso was found responsible for striking only one of three African-Americans struck by the State. 784 S.W.2d at 31-32. Likewise, the opinion in *(Dorothy) Miller-El* cited by Miller-El does not even reflect that Jim Nelson was involved in the case. 790 S.W.2d at 354-356. The record of that trial indicates that Nelson was lead prosecutor at Dorothy Miller-El's trial, but another prosecutor, Bruce Isaacks, was responsible for jury selection.

[68] Miller-El argues in a footnote that "[t]he state courts' failure to consider petitioner's pattern and practice evidence during the third stage of the *Batson* analysis constituted an independent violation of 28 U.S.C. § 2254(d)(1)." Petitioner's Brief at 45, n.36. This alternative argument—

judge apparently determined nonetheless (as he was certainly entitled to do) that such circumstantial evidence of discriminatory intent, which had no direct bearing on the actions of prosecutors in this case, was insufficient to prove purposeful discrimination in the face of the race-neutral, case-related reasons for the prosecutors' strikes documented abundantly by the record.

If accepted, Miller-El's submission would shift the burden of proof to the State to overcome all available circumstantial evidence of discrimination.[69] But under *Batson*, the ultimate burden of persuading the court that the State's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. 476 U.S. at 94 n.18 (citing *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. at 252-56); *Purkett v. Elem*, 514 U.S. at 768. Because Miller-El failed to satisfy his burden of proving discriminatory purpose, the trial judge found that the prosecutors did not act with discriminatory purpose. That determination is not unreasonable in light of the record, and Miller-El is not entitled to habeas relief.

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which, interestingly, played more predominantly in Miller-El's certiorari petition—is unsupported by the record. The trial judge clearly admitted the pattern and practice evidence over the State's objection on relevancy grounds. *See supra* at 29. The mere fact that the trial judge did not specifically mention this evidence in his written findings is not a sufficient basis to assume that the trial judge did not consider the evidence.

[69] *See, e.g.*, Petitioner's Brief at 40-41 ("only if the purportedly race-neutral explanations for the conduct in question *outweigh* the totality of evidence supporting a finding of discrimination can a court reject a claim of purposeful discrimination") (emphasis added); *id.* at 43 ("If such a disparity is to be *successfully defended* . . . the State's proffered explanation must be sufficiently persuasive to survive all the evidence tending to demonstrate that it engaged in purposeful discrimination. . . .") (emphasis added; citation and quotation omitted).

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT MILLER-EL WAS NOT ENTITLED TO A CERTIFICATE OF APPEALABILITY BASED ON HIS *BATSON* CLAIM.

Miller-El claims that the lower court erred in denying a certificate of appealability ("COA") because the court of appeals applied an incorrect standard in determining that Miller-El was not entitled to a COA, and because the court of appeals misinterpreted the provisions of 28 U.S.C. § 2254 to hold him to a higher burden of proof than that contemplated by the statute. Neither of the arguments is supported by the statute. But in any event, these issues are inconsequential to the resolution of Miller-El's claim. Miller-El is not entitled to relief under any permissible interpretation of the statute. And even if this Court were to conclude that Miller-El is entitled to a COA, it can, and should, affirm the denial of habeas corpus relief nonetheless.

A. The court of appeals correctly applied the certificate of appealability standard.

1. *The court below recited and applied* Slack.

Miller-El argues that the lower court erred by basing its denial of a COA on its own subjective finding that the underlying *Batson* claim lacked merit, in contravention of 28 U.S.C. § 2253. Petitioner's Brief at 32. A fair reading of the lower court's opinion refutes this assertion.

At the outset of its analysis of Miller-El's COA request, the court set out the proper standard for granting a COA:

> Under AEDPA, before an appeal from the dismissal or denial of a § 2254 habeas petition can proceed, the petitioner must first obtain a COA, which will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The same standards that governed issuance of the pre-AEDPA version of the COA, the certificate of probable cause ("CPC"), apply to requests for a COA. *See Slack v. McDaniel*, 529 U.S. 473 [] (2000). A petitioner makes a "substantial showing" when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further. *See id.* at [483-484].

JA 955-56. The court went on to review the merits of Miller-El's *Batson* claim in light of the presumptively correct state court finding that the prosecutors did not exercise peremptory challenges in a racially discriminatory manner, as well as the deferential standard of review mandated by 28 U.S.C. § 2254, and concluded "that this issue would not be debatable among jurists of reason, that courts could not resolve the issues in a different manner, and that the issue does not deserve encouragement to proceed further. Miller-El has thus failed to make a substantial showing of the denial of a constitutional right." JA 961.

Thus, the court clearly enunciated and applied the correct standard in determining that resolution of Miller-El's *Batson* claim was not debatable among jurists of reason in light of its review of the record and the great deference owed to the trial judge's finding that prosecutors did not discriminate against African-American prospective jurors. Miller-El seems merely to quibble with the breadth of the lower court's analysis.[70]

Miller-El theorizes that under the Fifth Circuit's formulation of the COA analysis, "only those habeas petitioners

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[70] Moreover, contrary to Miller-El's assertions, *see* Petitioner's Brief at 34 n.27, the court of appeals took into account this Court's admonition that "the nature of the penalty is properly considered in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issung of a certificate." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). *See* JA 956.

who ultimately prevail on appeal would be allowed to pursue an appeal in the first place, and the COA process would be converted, paradoxically, into the appeal itself." Petitioner's Brief at 34. However, in numerous cases, the Fifth Circuit has reviewed the merits of the underlying claim on which a petitioner's COA request was based, determined that a petitioner was entitled to a COA, then ultimately affirmed the district court's denial of relief, all in a single opinion. *See Foster v. Johnson*, 293 F.3d 766, 2002 WL 1233208 (5th Cir. June 6, 2002); *Robison v. Johnson*, 151 F.3d 256 (5th Cir. 1998); *Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997); *Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996) (overruled on other grounds); *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996) (overruled on other grounds).

The court of appeals applied the correct COA standard and determined, based on the fully supported state court findings and in light of the governing standard of review, that Miller-El was not entitled to a COA.

2. *The lower court's COA analysis was consistent with the precedent of this Court and the vast majority of federal circuit courts.*

Miller-El argues alternatively that the court of appeals erred when it took into account the deferential standard of review contained in 28 U.S.C. § 2254 in assessing whether Miller-El was entitled to a COA under § 2253(c). *See* Petitioner's Brief at 34 n. 29. He suggests that, in determining whether a COA should issue, a court should assess the merits of the constitutional issue in the abstract, rather than in the context of the limited nature of habeas corpus review. However, precedent from this Court and the overwhelming majority of federal circuits counsels against Miller-El's proposed approach, and the cases upon which Miller-El relies to support his contrary theory simply do not stand for the proposition for which they are cited.

Where the "district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find *the district court's assessment of the constitutional claims debatable or wrong*." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). In *Slack*, this Court recognized that the COA inquiry asks whether the district court erred in denying habeas corpus relief, and not necessarily whether the underlying constitutional claim has merit. *Id.* at 484-485. The Court held that, where a federal court's dismissal of a petition is based on procedural grounds, the petitioner has a two-part burden to satisfy to establish entitlement to a COA: first, he must demonstrate that reasonable jurists could disagree regarding the court's procedural ruling; and second, he must show that reasonable jurists could find he was entitled to relief based on his underlying claim. *Id.* Thus, a court may deny a COA based merely on its determination that no reasonable jurist could differ with a district court's dismissal of a petition on procedural grounds, without even taking into account the merits of the underlying constitutional claim. *Id.* at 484. The Court recognized the reality that an appeal is not warranted, and thus no COA should issue, when it is indisputable that the district court correctly denied relief, whether based on procedure or substance. *Id.*

Just as the doctrine of procedural default imposes a barrier on the granting of habeas corpus relief, § 2254 "place[s] a [] restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." *Williams v. Taylor*, 529 U.S. 362, 399 (2000). Thus, the rationale of *Slack* extends logically and necessarily to require that the COA inquiry account for the fact that the district court considers the claim, not in the abstract, but through the filter of the AEDPA's deferential scheme.

The federal circuit courts overwhelmingly follow this Court's logic in *Slack*, factoring the applicable standard of

review into the COA analysis. *See McWee v. Weldon*, 283 F.3d 179, 182 (4th Cir. 2002); *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000); *Hill v. Johnson*, 210 F.3d 481, 484-85 (5th Cir. 2000); *Dowthitt v. Johnson*, 230 F.3d 733 (5th Cir. 2000); *Wheat v. Johnson*, 238 F.3d 357 (5th Cir. 2001); *Cooey v. Coyle*, 289 F.3d 882, 897 (6th Cir. 2002); *Coleman v. Ryan*, 196 F.3d 793, 799-800 (7th Cir. 1999); *Nevius v. McDaniel*, 218 F.3d 940, 948 (9th Cir. 2000); *Johnson v. Hargett*, 229 F.3d 1163, 2000 WL 1093227, *2 (10th Cir. 2000) (unpublished); *see also Ramer v. Maxwell*, 2001 WL 55519 (10th Cir. 2001) (unpublished).

Miller-El fails to acknowledge this contrary authority and argues in support of his claim that "a number of courts of appeals have taken [his suggested] approach." Petitioner's Brief at 34-35 n.29 (citing *Cooey v. Coyle*, 289 F.3d 882 (6th Cir. 2002), *Coady v. Vaughn*, 251 F.3d 480 (3rd Cir. 2001), and *Shayesteh v. City of South Salt Lake*, 217 F.3d 1281 (10th Cir. 2000)). However, the cases he cites do not support his position. For example, Miller-El ignores the appendix to the Sixth Circuit's opinion in *Cooey*, which clearly states the opposite. *Cooey v. Coyle*, 289 F.3d at 897 (assuming that inquiry under § 2253(c) must take into account § 2254 (d) and (e)(1)).

Miller-El's reliance on *Coady* and *Shayesteh* is also unavailing, but for different reasons. First, neither case involved a federal court's review of a state court adjudication, and thus § 2254's standard of review was not even at issue. *Coady* dealt with the denial of a parole claim by a local parole board, which was not a state court adjudication and thus not entitled to deference under § 2254. 251 F.3d at 483. Similarly, in *Shayesteh*, the state courts had refused to adjudicate the petitioner's claim on the merits due to their application of an independent and adequate state procedural rule, which the federal district court had found barred federal review based on the procedural default doctrine. 217 F.3d at 1283-84.

Therefore, the deferential scheme of § 2254 had no bearing in either case. Second, to the extent that the courts of appeals addressed the COA issue before addressing the threshold doctrines of exhaustion and procedural default, they ran afoul of this Court's opinion in *Slack*.

The Fifth Circuit's COA analysis was correct and consistent with the precedent of this Court and the vast majority of other federal circuit courts.

B. The court of appeals correctly interpreted and applied 28 U.S.C. § 2254 to Miller-El's *Batson* claim.

Miller-El attacks the lower court's application of 28 U.S.C. § 2254 to his *Batson* claim, alleging that it erred in fusing the requirements of subsections (d)(2) and (e)(1), which govern federal courts' review of state court factual determinations. But where, as here, a single factual determination is dispositive of the constitutional claim, the lower court's approach was correct and mandated by logic.

Section 2254(d)(2) prohibits the granting of federal habeas corpus relief unless the state court adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2). Section 2254(e)(1) further provides that "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). These two provisions, while distinct, are necessarily intertwined and interdependent. The distinction so touted by Miller-El is further obscured, legitimately, in a case that does not involve multiple factual and legal determinations.

Given that the lower court's consideration of Miller-El's *Batson* claim essentially hinged on a single state court fact finding, it was entirely proper for the court of appeals to

aggregate its § 2254 analysis. Contrary to Miller-El's assertions, this formulation did not impermissibly heighten the standard of review. There is simply no meaningful difference between (1) requiring Miller-El to rebut the state court's finding of no purposeful discrimination by clear and convincing evidence, then demonstrate that same finding was unreasonable in light of the evidence presented, and (2) requiring him to demonstrate that the finding was unreasonable by clear and convincing evidence. The lower court merely took a practical approach to resolving Miller-El's claim, employing a permissible synthesis of two interrelated provisions.

Miller-El argues that the Fifth Circuit's approach does not accord independent significance to subsections (d)(2) and (e)(1). This is untrue. As the Fifth Circuit stated recently in *Valdez v. Cockrell*:

> [A] district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. See § 2254(e)(1). It is then a separate question whether the state court's determination of facts was unreasonable in light of the evidence presented in the state court proceeding. See § 2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).

274 F.3d 941, 951 n.17 (5th Cir. 2001). Thus, the court of appeals has recognized the distinction between the two provisions when that distinction is critical to resolution of the claims presented. But this two-tiered analysis is simply unnecessary when the court reviews a claim whose resolution depends on a single factual determination. In Miller-El's case, it was simply not incumbent on the court of appeals to address the provisions separately.

The Fifth Circuit's approach is supported by the majority of federal circuits, which have consistently recognized that subsections (d)(2) and (e)(1), while distinct, are necessarily intertwined and interdependent. *See, e.g., Sanna v. Paolo*, 265 F.3d 1, 7 (1st Cir. 2001) (noting that (d)(2) and (e)(1) must be interpreted in conjunction with one another); *Young v. Catoe*, 205 F.3d 750, 756 n.3 (4th Cir. 2000) (holding that federal habeas court must accept state court factual finding that is "not unreasonable, *see* 28 U.S.C. § 2254(d)(2), and has not been rebutted by clear and convincing evidence, *see* 28 U.S.C. § 2254(e)(1) . . . ."); *Torres v. Prunty*, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (recognizing that when federal habeas court decides "that the state court's factual determinations were unreasonable within the meaning of § 2254(d)(2), [it has] decided, of necessity, that on the existing record [the petitioner] has rebutted the 'presumption of correctness' of those findings by 'clear and convincing evidence.' *See* § 2254(e)(1)."); *Johnston v. Luebbers*, 288 F.3d 1048, 1055 (8th Cir. 2002) ("We conclude that Johnston has not met his burden of showing by clear and convincing evidence that the Missouri Supreme Court's factual determination on this issue was unreasonable").

This interplay is particularly crucial in the *Batson* context where a single factual determination is dispositive of the claim. *Weaver v. Bowersox*, 241 F.3d 1024, 1030-31 (8th Cir. 2001) (reversing district court's grant of habeas relief on *Batson*, holding that because petitioner had not rebutted state trial court's factual findings, court could not conclude that court's decision was unreasonable); *Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir. 2002) (affirming denial of *Batson* claim based on petitioner's failure to rebut state trial court's finding under § 2254(e)(1), without any discussion of whether finding was "unreasonable" under (d)(2)); *Gattis v. Snyder*, 278 F.3d 222, 235 (3rd Cir. 2002)(affirming district court's

denial of *Batson* claim, concluding that petitioner's failure to surmount (e)(1)'s presumption of correctness was fatal to his argument that state courts unreasonably applied federal law).

The court of appeals' interpretation and application of § 2254 were permissible and supported by the majority of federal circuits.

CONCLUSION

The trial judge properly credited the prosecutors' race-neutral, case-related reasons and held that Miller-El had failed to prove purposeful discrimination. If the Court accepts the proposition that the type of pattern and practice evidence on which Miller-El relies trumps a trial court's credibility evaluations in this case, then it necessarily would do so in every case tried within a particular time frame or by a particular prosecutor. This approach guts both the presumption of correctness and the even more fundamental rule that an appellate court cannot second-guess a trial court's credibility choices.

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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